Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–1150 OF 2006
AZIAH ALI J
12 DECEMBER 2007

Arbitration — Agreement — Jurisdiction of court — Extent of court's intervention — Whether court's power to intervene in an arbitration limited — Arbitration Act 2005 s 8

Arbitration — Stay of proceedings — Application — Whether stay ought to be granted — Whether s 10(1) of the Arbitration Act 2005 a mandatory provision — Whether exceptions where court could exercise discretion not to order a stay in existence — Arbitration Act 2005 s 10(1)(a), (b)

Civil Procedure — Stay of proceedings — Arbitration — Whether court ordinarily bound to stay legal proceedings in respect of matters subject of an arbitration proceeding — Exceptions to where court may exercise discretion to refuse a stay — Arbitration Act 2005 s 10

The plaintiff was a housing developer undertaking a housing project. Through an agreement dated 13 June 2005, it engaged the second defendant — a firm of consultant engineers — to design and supervise the construction of a retaining wall lining the plaintiff's project. The agreement incorporated an arbitration clause referring disputes to arbitration. The first defendant was the insurer under a 'Contractors-All-Risk Policy' but was not a party to the agreement between the plaintiff and the second defendant. The retaining wall could not retain its position and moved, causing the plaintiff to suffer damages and losses. The first defendant repudiated liability on the basis that the damages and losses suffered by the plaintiff were not covered by the policy. The plaintiff sued the first defendant for breaching the policy. It also sued the second defendant for designing a defective and inadequate retaining wall. The second defendant applied to stay proceedings against it pursuant to s 10(1) of the Arbitration Act 2005 ('the Act'). The plaintiff opposed this application. Counsel for the second defendant submitted, inter alia, that: (i) s 10 of the Act was a mandatory provision that required the court to grant a stay, except where the exceptions under sub-s (1) paras (a) or (b) arose; (ii) the

agreement was not null and void, inoperative or incapable of being performed; (iii) there was no dispute as to the existence of the agreement. Plaintiff's counsel however submitted, inter alia, that: (a) allowing the application would result in a multiplicity of actions since the first defendant was not a party to the agreement and was not subject to arbitration; (b) two proceedings would result in conflicts, extra costs and delay in reaching finality; (c) a stay would prejudice the first defendant as the first defendant was not a party to the agreement and would not be represented in the arbitration proceedings; and (d) the plaintiff would be prejudiced as the decision of the arbitrator would not bind the first defendant; and (e) s 8 of the Act allowed the court to intervene.

Held, allowing the application:

(1) There was no dispute between the parties with regard to the matter to be referred to arbitration. Neither were the parties disputing the agreement (see para 17).

(2) Multiplicity of proceedings in the instant case was induced by the plaintiff's own action. The plaintiff could not come to court and object to the second defendant's exercise of its right under the agreement by relying on grounds that the plaintiff itself had created. A party to an arbitration agreement who embarks on a course of conduct or undertakes a course of action that may give rise to circumstances inconsistent with what it had agreed to in the arbitration agreement, is not at liberty to subsequently rely on such conduct or action as grounds to avoid the arbitration agreement. Such conduct or course of action cannot be relied on to justify the argument that the arbitration agreement has been rendered inoperative or incapable of being performed. Such argument does not come within the scope of s 10(1)(a). Conflicts, extra costs and delay in reaching finality that arose out of such conduct or course of action were irrelevant in considering s 10(1) of the Act (see para 18).

(3) The decision in the claim against the first defendant may not necessarily be applicable in the claim against the second defendant. These were two separate causes of action based on two separate agreements. The issues to be determined in the arbitration proceedings as regards the liability of the second defendant may not be similar to the issues for trial in the claim against the first defendant. In any event, this was not a ground within the scope of the exceptions under s 10(1) (see para 19).

(4) The issue of the first defendant not being bound by the arbitrator's award was an enforcement issue and as such was not within the scope of s 10(1) (see para 21).

(5) The extent of the court's power to intervene under s 8 of the Act is limited to what is expressed in the said provision, which is, unless the Act provides otherwise the court cannot intervene. In the instant case, there was no ground to intervene (see para 22).

(6) Section 10(1) imposes upon the court an obligation to stay proceedings unless the plaintiff's case falls within the words of the exception. In the instant case, none of the grounds put forward by the plaintiff came within the exceptions. Therefore, this was not a matter in respect of which the court had a discretion (see para 23).

[Bahasa Malaysia summary

Plaintif merupakan pemaju perumahan yang mengusahakan projek perumahan. Melalui perjanjian bertarikh 13 Jun 2005, ia melantik defendan kedua — firma perunding jurutera — untuk mereka bentuk dan mengawasi pembinaan dinding penahan sebagai sempadan projek plaintif. Perjanjian tersebut memasukkan klausa timbangtara untuk merujuk pertikaian kepada penimbangtaraan. Defendan pertama merupakan syarikat insurans di bawah 'Contractors-All-Risk Policy' tetapi bukan pihak kepada perjanjian di antara plaintif dan defendan kedua. Dinding penahan itu tidak dapat mengekalkan kedudukannya dan beranjak, menyebabkan plaintif mengalami kerosakan dan kerugian. Defendan pertama tidak mengaku liabiliti atas dasar bahawa kerosakan dan kerugian yang dialami oleh plaintif tidak terangkum oleh polisi tersebut. Plaintif mendakwa bahawa defendan pertama telah memungkiri polisi tersebut. Ia juga mendakwa defendan kedua kerana mereka dinding penahan yang defektif dan tidak kuat. Defendan kedua memohon untuk menggantung prosiding terhadapnya menurut s 10(1) Akta Timbangtara 2005 ('Akta tersebut'). Plaintif menentang permohonan ini. Peguam bagi pihak defendan kedua berhujah, antara lain, bahawa: (i) s 10 Akta tersebut merupakan peruntukan mandatori yang menghendaki mahkamah membenarkan penggantungan, kecuali di mana pengecualian-pengecualian di bawah sub-s (1) perenggan-perenggan (a) atau (b) timbul; (ii) perjanjian tersebut tidak terbatal dan tidak sah, tidak berkuat kuasa atau tidak dapat dilaksanakan; (iii) tiada pertikaian tentang kewujudan perjanjian tersebut. Peguam plaintif bagaimanapun menghujahkan, antara lain, bahawa: (a) dengan membenarkan permohonan itu akan menghasilkan banyak tindakan memandangkan defendan pertama bukan pihak kepada perjanjian tersebut dan tidak tertakluk kepada penimbangtaraan; (b) dua prosiding akan menyebabkan konflik, kos tambahan dan kelewatan dalam mencapai keputusan; (c) suatu penggantungan akan menyebabkan prasangka terhadap defendan pertama kerana defendan pertama bukan pihak kepada perjanjian dan tidak akan diwakili dalam prosiding timbangtara; dan (d) plaintif akan diprejudiskan kerana keputusan penimbangtara tidak akan

A mengikat defendan pertama; dan (e) s 8 Akta tersebut membenarkan mahkamah campur tangan.

B **Diputuskan**, membenarkan permohonan:

(1) Tiada pertikaian antara pihak-pihak berhubung perkara yang akan dirujuk kepada penimbangtaraan. Pihak-pihak juga tidak mempertikaikan perjanjian tersebut (lihat perenggan 17).

C (2) Kepelbagaian prosiding dalam kes ini disebabkan oleh tindakan plaintif sendiri. Plaintif tidak boleh ke mahkamah dan membantah pelaksanaan hak defendan kedua di bawah perjanjian tersebut dengan bersandarkan kepada alasan-alasan yang dibuat oleh plaintif sendiri. Satu pihak kepada perjanjian timbangtara yang memulakan tindakan atau
D mengambil tindakan yang mungkin menimbulkan keadaan yang tidak konsisten dengan apa yang telah dipersetujuinya dalam perjanjian timbangtara, tidak mempunyai kebebasan untuk bersandar kepada perlakuan atau tindakan sedemikian sebagai alasan-alasan untuk mengelakkan daripada perjanjian timbangtara tersebut. Perlakuan atau
E tindakan sedemikian tidak boleh digunakan untuk menjustifikasikan hujah bahawa perjanjian timbangtara dianggap tidak berkuat kuasa atau tidak dapat dilaksanakan. Hujah sebegini tidak terangkum di bawah skop s 10(1)(a). Konflik, kos tambahan dan kelewatan mencapai
F keputusan yang timbul daripada perlakuan atau tindakan sebegini tidak relevan dalam mengambilkira s 10(1) Akta tersebut (lihat perenggan 18).

(3) Keputusan dalam tuntutan terhadap defendan pertama tidak semestinya boleh digunakan dalam tuntutan terhadap defendan kedua.
G Kedua-dua kausa tindakan yang berasingan ini adalah berdasarkan dua perjanjian yang berasingan. Isu-isu yang perlu ditentukan dalam prosiding timbangtara berhubung liabiliti defendan kedua tidak mungkin sama dengan isu-isu untuk perbicaraan dalam tuntutan terhadap defendan pertama. Bagaimanapun, ini bukan alasan dalam
H skop pengecualian s 10(1) (lihat perenggan 19).

(4) Isu defendan pertama tidak terikat oleh award penimbangtara merupakan isu penguatkuasaan dan oleh demikian tidak terangkum dalam skop s 10(1) (lihat perenggan 21).

I (5) Takat kuasa mahkamah untuk campur tangan di bawah s 8 Akta tersebut adalah terhad kepada apa yang dinyatakan dalam peruntukan tersebut, iaitu, kecuali jika Akta tersebut memperuntukkan sebaliknya mahkamah tidak boleh campur tangan. Dalam kes ini, tidak ada alasan untuk campur tangan (lihat perenggan 22).

(6) Seksyen 10(1) memberikan tanggungjawab ke atas mahkamah untuk menggantung prosiding kecuali kes plaintif terangkum dalam perkataan-perkataan pengecualian tersebut. Dalam kes ini, tiada alasan dikemukakan oleh plaintif yang terangkum dalam pengecualian tersebut. Oleh itu, ini bukan perkara yang mana mahkamah mempunyai budi bicara (lihat perenggan 23).]

Notes

For cases on application for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1418–1458.

For cases on arbitration, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6540–6561.

For cases on jurisdiction of court, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1146–1158.

Cases referred to

Innotec Asia Pacific Sdn Bhd v Innotec GmbH [2007] 3 AMR 67 (folld)

Janos Paczy v Haendier & Natermann GmbH [1981] 1 Lloyd's Rep 302 (refd)

Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd [1969] 1 Lloyd's Rep 214 (refd)

Radio Publicity (Universal) Ltd v Compagnie Luxembourgeoise de Radioffusion [1936] 2 All ER 721 (refd)

'Rena K', The [1978] 1 Lloyd's Rep 545 (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 10(1), 10(1)(a), 10(1)(b)

R Sadacharam (David Lingam & Co) for the plaintiff.
CK Oon (CK Oon & Co) for the second defendant.

Aziah Ali J:

[1] The plaintiff is the developer of a project known as Cadangan Pembangunan 130 Units Townhouse at Section 14, Kota Damansara, Mukim Sungai Buloh, Daerah Petaling, Selangor Darul Ehsan ('the development'). The second defendant is a firm of professional consultants and engineers carrying out consultation and design work for the construction industry. The parties entered into a written engagement agreement ('agreement') dated 13 June 2005 whereby the second defendant undertook for payment to design and supervise the construction of a retaining wall lining the development (see encl 9 exh 'KC–2'). The plaintiff alleged that on 20 December 2004 a section of the retaining wall lining the development moved forward a distance of about 120mm thereby causing damage and losses to the plaintiff. On 26 October 2005, several concrete columns on the

development deviated from their respective positions and tilted as a result of the retaining wall being unable to retain its position. This resulted in the plaintiff having to carry out rectification works and delay the completion of the development.

[2] The plaintiff made a claim against the first defendant as insurer under a Contractor's All Risk Policy. The first defendant repudiated liability on the ground that the movement of the retaining wall together with the tilting of the concrete columns were attributed to the faulty design of the retaining wall. Therefore according to the first defendant the damages and losses suffered by the plaintiff were not covered under the policy.

[3] The plaintiff through their solicitors sent a notice to the second defendant that in the event the damage and losses caused by the retaining wall was as a result of faulty design, then the plaintiff holds the second defendant liable for the said damage and losses suffered. The second defendant refuted 'any allegation that the movement of the retaining wall has been caused by faulty design on the part of the second defendant'.

[4] The plaintiff instituted legal proceedings against the first defendant for wrongfully breaching the terms of the policy and against the second defendant for:

> breach of the express, alternatively implied terms and conditions of the agreement in designing a Retaining Wall which contained serious and substantial defects which prevented the Retaining Wall from being used as the plaintiff had intended and which was inadequate for the purpose of ensuring safety against sliding;
>
> failing to exercise reasonable care and skill in designing a Retaining Wall which contained serious and substantial defects which prevented the Retaining Wall from being used as the plaintiff had intended and which was inadequate for the purpose of ensuring safety against sliding.

[5] The present application concerns only the plaintiff and the second defendant who are parties to the agreement which incorporated an arbitration clause as per cl 29.01 which states as follows:

> 29 DISPUTES
>
> 29.01 Any matters or disputes shall in accordance with and subject to the provisions of the Arbitration Act 1952 or any statutory modification or re-enactment thereof for the time being in force be referred to two (2) arbitrators (one to be appointed by each party to the dispute or difference) who shall by instrument in writing appoint an umpire immediately after they are themselves appointed. If either party shall refuse or neglect to appoint an arbitrator for seven (7) clear days after the other party having appointed his arbitrators has served the party making default with notice to make the appointment the party who has

appointed the arbitrator shall be entitled to appoint that arbitrator to act as sole umpire in the reference. Upon every or any such reference the umpire shall have power to determine on the disputes that are being referred to them and their decision shall be accepted by both parties hereto as final.

It is pursuant to the above clause that the second defendant filed the application vide encl 8 for an order to stay proceedings in respect of the second defendant under s 10(1) of the Arbitration Act 2005. The plaintiff objected to this application. After hearing submissions I agreed with counsel for the second defendant and allowed the second defendant's application. The plaintiff now appeals against this decision.

[6] Section 10(1) of the Arbitration Act 2005 which the second defendant relies on provides as follows:

10. Arbitration agreement and substantive claim before court.

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as fit deems fit.

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[7] The grounds put forward by the second defendant in support of their application in encl 8 are as follows:

(i) Plaintif dan defendan kedua telah melalui perjanjian bertulis bersetuju untuk merujukkan kepada timbangtara perkara-perkara yang merangkumi/melibatkan atau menjadi asas tuntutan-tuntutan yang mana tindakan ini dibawa.

(ii) Tuntutan-tuntutan yang dibuat oleh plaintif kepada defendan kedua adalah berasaskan isu-isu teknikal yang kompleks yang meliputi keputusan isu-isu dan fakta-fakta dalam bidang kejuruteraan

A geoteknikal ('geotechnical engineering') di mana ianya lebih sesuai diputuskan oleh penimbangtara yang berpengalaman dalam bidang tersebut.

In support of the application counsel for the second defendant submits that:

B
(i) s 10(1) of the Act is a mandatory requirement for the court to stay a proceeding and refer it to arbitration. Only when the situations in sub-s 10(1)(a) or (b) apply, ie, (a) 'that the agreement is null and void, inoperative or incapable of being performed' and (b) 'that there is in fact no dispute between the parties with regard to the matters to be referred', that the court has the discretion to not grant a stay;

C

(ii) the arguments raised by the plaintiff viz: multiplicity of proceedings, extra costs involved, delay in reaching finality and procedural difficulties do not, for each and everyone of them, render the arbitration agreement 'null and void, inoperative or incapable of being performed';

D

(iii) that the complex nature of the plaintiff's claim would be best heard by an arbitrator with an engineering background.

E

[8] Counsel for the second defendant submits that there is no dispute as to the existence of the agreement and that the principal and major issue is whether the retaining wall carried a faulty design. Counsel says that this was tacitly recognised by the plaintiff through para 23 of their affidavit *jawapan* (see encl 9). Counsel also submits that the dispute is within the scope of the agreement.

F

[9] According to counsel what is in issue in the present application is the court's jurisdiction. Counsel submits that unlike the provisions of the Arbitration Act 1952 (which has been repealed) in which s 6 of that Act uses the word 'may' which gives the court a certain discretion whether or not to stay proceedings, the Arbitration Act 2005 (the new Act) as per the provisions of s 10(1) uses the word 'shall' which has the effect of confining the exercise of the court's discretion to grant a stay only when the situations under s 10(1)(a) or (b) are applicable. On this issue counsel referred to the case of *Innotec Asia Pacific Sdn Bhd v Innotec GmbH* [2007] 3 AMR 67 at p 81 where Ramly Ali J said, inter alia, as follows:

G

H

> The Arbitration Act 2005 (the new Act) came into force on 15 March 2005. The power of the court to grant a stay of proceedings is as provided under s 10 of the Act. Pursuant to this new provision, the general discretion vested in the court to

I

stay court proceedings is no longer available. Instead, the requirement to stay is mandatory, on an application by the party before taking any other steps in the proceedings, unless the court finds either that:

(1) the agreement is null and void, inoperative or incapable of being performed; or

(2) there is in fact no dispute between the parties with regard to the matters to be referred.

His Lordship further states at p 82 as follows:

The language of s 10 of the Arbitration Act 2005 does not exclude jurisdiction of the court to stay proceedings for the purpose of referring the matter to arbitration based on their agreement. Instead, the requirement to stay is generally mandatory.

[10] Learned counsel also submits that this is not a case where the agreement is null and void, inoperative or incapable of being performed. On this issue, in *Innotec Asia Pacific Sdn Bhd v Innotec GmbH*, Ramly Ali J said at p 83, 'An arbitration agreement is null and void if it is void ab initio. It does not include a merely voidable agreement'. Counsel submits that this is not the case here. Counsel also submits that the agreement is perfectly operative and refers to the English case of *Radio Publicity (Universal) Ltd v Compagnie Luxembourgeoise de Radioffusion* [1936] 2 All ER 721 where the court said at p 728:

It appears to me that, where there is an agreement between the parties, which not only involves certain duties on each side, but also involves an agreement that disputes shall be settled by arbitration, until all matters in dispute under the agreement have been duly settled, the agreement is still perfectly operative …

[11] With regard to the issue of whether the agreement is capable of being performed, learned counsel refers to the cases of *Janos Paczy v Haendier & Natermann GmbH* [1981] 1 Lloyd's Rep 302 and the case of *The 'Rena K'* [1978] 1 Lloyd's Rep 545. In *Janos Paczy*'s case Buckley LJ said at p 307:

The incapacity of one party to that agreement to implement his obligations under the agreement does not, in my judgment, render the agreement one which is incapable of performance … The agreement only becomes incapable of performance in my view if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it.

His Lordship said further at p 308:

In my judgment the plaintiff cannot rely on his own inability to carry out his part of the arbitration agreement as a means of securing a release from the arbitration agreement … The arbitration agreement remains an agreement which is perfectly capable of being performed if the parties are themselves capable of performing it …

In *The 'Rena K'* Brandon J said at pp 552–553, inter alia:

> … it appears to me that the words 'incapable of being performed' should be construed as referring only to the question whether an arbitration agreement is capable of being performed up to the stage when it results in an award; and should not be construed as extending to the question whether, once an award has been made, the party against whom it is made will be capable of satisfying it.
>
> Thus counsel submits that the agreement is not null and void or inoperative or incapable of being performed. Therefore the exceptions under s 10(1) are not applicable and the court has the duty to stay the proceedings and to refer the matter to arbitration.

[12] Learned counsel for the plaintiff concedes that the major or principal issue of fact is whether the design of the retaining wall was faulty. Counsel also agrees with the submissions made by counsel for the second defendant with regard to s 10(1). However learned counsel for the plaintiff says that allowing the application will result in multiplicity of proceedings as in this case there are two defendants, and one of the defendants is not a party to the agreement. Counsel submits that it is undesirable for two proceedings to be in two different tribunals due to the potential risk of different decisions or inconsistent findings of fact. According to the plaintiff's counsel the issue in the plaintiff's claim ie whether there is design fault or not, is jointly applicable to the claims against the first and second defendant. If the adjudicator finds that the retaining wall carried a faulty design, the second defendant will accordingly be liable but if the adjudicator finds the retaining wail does not carry a faulty design, the first defendant becomes liable under the insurance policy. Counsel says that there is a risk that the decision of the arbitrator may differ from the decision of the court on the issue of faulty design. Apart from that counsel says that as there are two defendants it will be convenient for proceedings to be in one forum. Having two proceedings will result in conflicts, extra costs and delay in reaching finality. Therefore multiplicity of proceedings should be avoided and the court should exercise proper discretion not to stay proceedings. Counsel submits that the court is the best forum to adjudicate the dispute between the parties as it is capable of adjudicating difficult issues and may invite experts to assist.

[13] Counsel further submits that allowing the application may prejudice the first defendant as the first defendant is not a party to the agreement and will not be represented in the arbitration proceedings. Counsel also says that the first defendant may refuse to be bound by the decision of the arbitrator and this will lead to chaos and justice will not be served.

[14] In reply the second defendant's counsel submits that the nature of the claim and the issues have no bearing in the present application. Counsel says that there is no multiplicity of proceedings as the action against the first and

second defendant are two separate causes of action based on two separate agreements. These two agreements are unrelated but the plaintiff is pursuing against two different parties on two separate agreements in one action. Therefore counsel submits that the multiplicity of proceedings is induced by the plaintiff.

[15] The second defendant's counsel also disagrees with the submission that if there is a finding of no faulty design then the first defendant will be liable or if there is a finding of faulty design then the second defendant will be liable. Counsel submits that the findings of fact in one action does not necessarily lead to the other. Counsel refers to the case of *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* [1969] 1 Lloyd's Rep 214 where Winderyer J opined as follows:

> We are concerned with the word 'faulty' as descriptive of an inanimate thing … But a man may use skill and care, he may do all that in the circumstances could reasonably be expected of him, and yet produce something which is faulty because it will not answer the purpose for which it was intended. His product may be faulty although he be free of blame.

[16] With regard to the submission that the court should exercise its discretion, counsel says that under s 10(1) of the new Act there is no question of exercise of discretion. As the agreement is not null and void, inoperative or incapable of being performed counsel submits that it is mandatory for the court to grant a stay of proceedings.

[17] Having considered the submissions by both parties, I find that there is no dispute between the parties with regard to the matter to be referred to arbitration. Neither are the parties disputing the agreement. In opposing the application, the contention of the plaintiff is that if the matter is referred to arbitration, the arbitration agreement will be rendered inoperative and incapable of being performed, extra costs will be incurred by having two separate proceedings, there will be a delay in reaching a finality, there will be multiplicity of proceedings, conflicting decisions, that the first defendant will be prejudiced as they will not be heard in the arbitration proceedings and that the plaintiff will be prejudiced as the decision of the arbitrator will not bind the first defendant (see encl 9).

[18] On the issue of multiplicity of proceedings I agree with submissions made by the second defendant's counsel that multiplicity of proceedings as in the present case is induced by the plaintiff's own action. I am of the opinion that the plaintiff cannot come to court and object to the second defendant's exercise of their right under the agreement by relying on grounds that they

A themselves had created. To my mind a party to an arbitration agreement who embarks on a course of conduct or undertakes a course of action that may give rise to circumstances that are inconsistent with what they have agreed to in the arbitration agreement is not at liberty to subsequently rely on such conduct or action as grounds to avoid the arbitration agreement. Such B conduct or course of action cannot be relied on to justify the argument that the arbitration agreement has been rendered inoperative or incapable of being performed. Such argument does not come within the scope of s 10(1)(a). The issue of conflicts, extra costs and delay in reaching finality that arises out of such conduct or course of action are also irrelevant in considering s 10(1).

C

[19] With regard to the submission that there will be conflicting decisions I agree with counsel for the second defendant's submissions that the decision in the claim against the first defendant may not necessarily be applicable in the claim against the second defendant. These are two separate causes of D action based on two separate agreements. The issues to be determined in the arbitration proceedings as regards the liability of the second defendant may not be similar to the issues for trial in the claim against the first defendant. In any event this is not a ground within the scope of the exceptions under s 10(1).

E

[20] On the submission that the decision of the arbitrator does not bind the first defendant as the first defendant is not subject to arbitration proceedings I refer to the case of *The 'Rena K'* cited by the second defendant's counsel and the explanation by Brandon J on the context in which the words F 'null and void, inoperative or incapable of being performed' are used. At the risk of being repetitive I produce again what His Lordship says below:

> … it appears to me that the words *incapable of being performed* should be construed as referring only to the question whether an arbitration agreement is capable of G being performed up to the stage when it results in an award.
>
> … the context in which the words 'incapable of being performed' are used is the context of the recognition and enforcement of arbitration agreements which, if valid and effective, will result in awards being made; not the context of the recognition and enforcement of such awards themselves after they have been made; H and should not be construed as extending to the question whether, once an award has been made, the party against whom it is made will be capable of satisfying it.
>
> (Emphasis added.)

Therefore in my opinion the issue of the first defendant not being bound by I the arbitrator's award is an enforcement issue and as such is not within the scope of s 10(1).

[21] In his final submissions counsel for the plaintiff referred to s 8 of the new Act and submits that the said provision does not exclude the court from intervening. Section 8 provides as follows:

> 8 Extent of court intervention
>
> Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.

However counsel for the second defendant submits that the said provision clearly shows that the court shall not interfere. On this issue I am of the opinion that the extent of the court's power to intervene is limited to what is expressed in the said provision, which is, unless the Act provides otherwise the court cannot intervene, in the present case I find no ground to intervene.

[22] In conclusion I agree with what has been said by Ramly Ali J in *Innotec*'s case that s 10(1) imposes upon the court an obligation to stay proceedings unless the plaintiffs case falls within the words of the exception. I find that none of the grounds put forward by the plaintiff come within the exceptions. That being the case this is not a matter in respect of which the court has a discretion. I therefore allowed the second defendant's application as prayed.

Application allowed.

Reported by Andrew Christopher Simon